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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1744

WILLIE R. BARNES, as Commissioner of Corporations of the State of California,

Petitioner,

v.

HEWLETT-PACKARD COMPANY, a California corporation, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Wells Fargo and Company in Opposition

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Respondent Wells Fargo and Company (Wells Fargo) opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

1. Other respondents in this proceeding are HEWLETT-PACKARD COMPANY, a California corporation, STANDARD OIL COMPANY OF CALIFORNIA, a Delaware corporation, THE PACIFIC LUMBER COMPANY, a Maine Corporation, THE PACIFIC LUMBER COMPANY EMPLOYEE BENEFIT ORGANIZATION, a nonprofit Delaware corporation, JOHN SCALONE AND FREDDY SANCHEZ, as trustees of the JOINT BENEFIT TRUST established by CALIFORNIA STATE COUNCIL OF CANNERY AND FOOD PROCESSING UNIONS and the SOUTHERN CALIFORNIA DRUG BENEFIT FUND.

Pursuant to Rule 40(3) of the Supreme Court, respondent adopts the statements of petitioner on Opinions Below, Jurisdiction, Constitutional and Statutory Provisions Involved and Statement Pursuant to Rule 33(2)(b).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the federal Employee Retirement Income Security Act of 1974 (ERISA) preempts regulation of employee welfare benefit plans by the California Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene).

2. Whether the Court of Appeals correctly held that in the context of this case, the preemption provisions of ERISA do not offend the McCarran-Ferguson Act.

3. Whether the Court of Appeals correctly held that enactment of ERISA is a valid exercise of Congressional power under the commerce clause, Article 1, section 8, clause 3 of the United States Constitution.

4. Whether the Court of Appeals correctly held that preemption by ERISA of a state law which regulates private activity does not violate the Tenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

We will not burden the Court with an analysis of petitioner's statement of the case. The essential facts, acknowledged by petitioner, do, however, bear repeating: that the employee benefit plans maintained by respondents are self-funded employee welfare benefit plans within the meaning of ERISA and are all subject to regulation under that Act. (Pet., pp. 4-5) The contentions of this respondent are that: (1) To the extent that the State of California seeks under Knox-Keene to regulate Wells Fargo's self-funded employee benefit plans, the state is preempted by ERISA; (2) The state's power to regulate insurance under the McCarran-Ferguson Act has not been impaired by ERISA's preemption of Knox-Keene; (3) ERISA is a valid exercise of Congressional power under the commerce clause; and (4) ERISA does not violate the Tenth Amendment.

ARGUMENT

The Ninth Circuit's Decision Is Sound and Correct.

A. THE COURT BELOW CORRECTLY HELD THAT THE STATE'S ATTEMPT TO REGULATE UNDER KNOX-KEENE THE EMPLOYEE BENEFIT PLANS MAINTAINED BY THE RESPONDENTS IS PREEMPTED BY ERISA.

The sometimes difficult task of determining whether Congress intended to preempt state regulation in a particular field was made easy by ERISA's clear, unambiguous language and a revealing legislative history. Section 514(a) of ERISA, the preemption clause, states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975. (29 U.S.C. § 1144(a).)

As the district court observed in its opinion below, "[T]he Court doubts that Congress could have chosen any more precise language to express its intent to preempt a state statute such as Knox-Keene insofar as it seeks to regulate ERISA-covered employee benefit plans such as those maintained by [respondents]." (425 F.Supp. at p. 1297; Pet., App. B, p. 13) The Ninth Circuit agreed.[2]

There is no dispute that the benefit plans maintained by respondents are subject to ERISA.[3] This ends the inquiry. Con-

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2. "The clear wording of section 514 and the relevant legislative history shows that Congress unmistakably intended ERISA to preempt a state law such as Knox-Keene that directly regulates employee benefit plans." (571 F.2d at p. 504; Pet., App. A, p. 3.)

3. See ERISA, Section 3, 29 U.S.C. § 1002(1) and Pet. pp. 4-5.

gress has stated unequivocally its intent to preempt any state regulation of benefit plans covered by ERISA.[4] Knox-Keene is such a state regulation and it is, therefore, preempted.

Petitioner attempts to avoid the clear mandate of ERISA by claiming that Knox-Keene is a state law which regulates insurance and that it is exempt from the preemption clause because of section 514(b)(2)(A), which provides:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities. (29 U.S.C. § 1144(b)(2)(A))

Congress, in apparent anticipation that the states would try to circumvent the preemption clause with statutory schemes purporting to "regulate insurance" but which in practical effect regulate benefit plans subject to ERISA, enacted section 514(b)(2)(B), the "deemer" clause:

> *"Neither an employee benefit plan* described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, *shall be deemed to be an insurance company or other insurer*, bank, trust company, or investment company *or to be engaged in the business of insurance* or banking *for purposes of any law of any State purporting to regulate insurance* companies, insurance contracts, banks, trust companies, or investment companies." (Emphasis added) (29 U.S.C. § 1144(b)(2)(B).)

4. The legislative history is recited at length in the opinion of the district court, so we will not repeat it here except to quote from the remarks of Senator Harrison Williams, which remarks we believe crystallize the intent of the Congress:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulations of employee benefit plans. *This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.*" (Emphasis added) (120 Cong. Rec. 29933 (1974).

Thus, even if the state's characterization of Knox-Keene as an insurance law is correct, Congress specifically precluded the classification of ERISA-covered employee benefit plans as insurance for purposes of the state law and, consequently, eliminated for the states any opportunity to evade the preemption clause. The district court so held; the Ninth Circuit affirmed, and correctly so.[5]

There is nothing to clarify and, therefore, no need for this Court to act.

B. IN THE CIRCUMSTANCES OF THIS CASE, PREEMPTION OF KNOX-KEENE DOES NOT DETRACT FROM THE STATE'S POWER TO REGULATE INSURANCE; NOR DOES IT IMPAIR THE McCARRAN-FERGUSON ACT.

The salient feature of Wells Fargo's employee benefit plan is that it is self-funded. There is no insurance policy backing it up, nor is there any insurance company or other issuer of any kind of

5. Petitioner also makes the obligatory arguments that Knox-Keene is not preempted because it is more pervasive than ERISA, that Knox-Keene regulates more facets of health care plans than does ERISA, and that preemption of Knox-Keene will somehow work a travesty on the populace of the State of California. (Pet. pp. 7-10.) Whether the state law is better or worse or broader or narrower than the federal statute is not even relevant to the question of preemption. The only question is whether Congress intended, as it did here, to occupy the field. If so, the state is preempted. *Charleston & Car. R.R. Co. v. Varnville Co.*, 237 U.S. 597, 604 (1915); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947); c.f. *Malone v. White Motor Corp.*, ... U.S. ...., 46 USLW 4295 (April 3, 1978).

Petitioner's shrill assertion that preemption of Knox-Keene will "result in a potentially disastrous reduction in protection afforded persons enrolled in self-funded . . . plans" (Pet., pp. 9-10) is unfounded. The so-called protections of Knox-Keene have never actually existed in California. Knox-Keene became effective on July 1, 1976, almost a year and one-half after the January 1, 1975 effective date of ERISA (Pet., p. 5) and never actually applied to these respondents because of the injunction issued by the district court in the proceedings below. California's prior law (see California Government Code Section 12530(a)) specifically excluded from its regulation plans such as the one Wells Fargo now maintains. Thus, there has been no "reduction in protection."

certificate of insurance to which the state can apply the regulations. Rather, the regulations fall directly upon Wells Fargo, the employer maintaining the ERISA-covered plan. *This* is what distinguishes the present case from *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, ... U.S. ....., 46 U.S.L.W. 3645 (April 17, 1978)[6] and *Wayne Chemical Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir. 1977), wherein it was held that the respective state insurance laws were not preempted by ERISA.

In *Whaland* and *Wayne Chemical* the impact of the state regulation fell directly upon the issuer of the insurance policy purchased by the employer to back up the plan and only indirectly upon the plan itself. (See 562 F.2d at p. 78 and 567 F.2d at p. 700). Indeed, the Court of Appeals in *Whaland*, citing with approval the district court's opinion in the present case, acknowledges that crucial distinction:

> ". . . Any possible conflict between the state's regulation of insurance and the regulatory provisions of ERISA must be resolved by the application of the 'deemer' clause, § 514(b)(2)(B).
>
> * * *
>
> "The deemer clause simply provides that a state may not deem an employee benefit plan to be an insurance company, insurer, or in the business of insurance for the purposes of its insurance laws. Consequently, a state may not regulate an employee benefit plan simply because the plan serves as self-insurer on all of its benefits. Thus, the deemer provision prevents a state from subjecting a plan, as a business of insurance, to the state's general insurance laws or enacting special legislation regulating plans as a 'unique variety of insurance.' Hewlett-Packard Co. v. Barnes, 425 F.Supp. 1294, 1300 (N.D.Cal. 1977). However, on its face the deemer provision does not prohibit a state from indirectly affecting plans by regulating the contents of group insurance policies purchased by the plans." (562 F.2d at pp. 77-78.)

6. Curiously, petitioner has reproduced in Appendix D to his petition the *district court* opinion in *Whaland*. The appellate decision differs in many respects and obviously supersedes *pro tanto* the district court's order.

Thus, the Ninth Circuit's decision in the present case does not infringe in the slightest California's power to regulate the business of insurance.[7]

Nor does the construction of ERISA by the courts below impair any state insurance law within the meaning of the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. § 1011, *et seq.* (See petitioner's argument at Pet., pp. 13-15). Nothing more can or need be said than what the Ninth Circuit has already said on this point: on the one hand, that McCarran-Ferguson does not apply at all because, under the "deemer" clause (ERISA § 514(b)(2)(B), *supra*), covered employee benefit plans are not to be considered as insurance; or, on the other hand, if Knox-Keene is an insurance law designed to regulate ERISA-covered benefit plans, then ERISA is a federal law which "specifically relates" to insurance and therefore falls with McCarran-Ferguson's explicit exception.[8] (571 F.2d at p. 505; Pet., App. A, pp. 5-6.) Under either view, McCarran-Ferguson remains undisturbed.

C. THERE IS NO CONSTITUTIONAL INFIRMITY.

Petitioner asserts that Congress has somehow exceeded the scope of its powers under the commerce clause (Pet., pp. 15-18)[9]

7. And since *Whaland* and *Wayne Chemical* are so clearly distinguishable and so easily reconcilable, there is no conflict among the Circiuts such as would induce this Court to rule.

8. 15 U.S.C. § 1012(b) provides:
> "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . *unless such Act specifically relates to the business of insurance*. . . ." (Emphasis added.)

9. Petitioner concedes that Congress has the power to enact a law like ERISA on commerce grounds. His complaint is that Congress did not go far enough. (Pet., p. 17.)

and that ERISA violates the Tenth Amendment. (Pet., pp. 18-20.) It is really a single argument, and it boils down to this: Congress failed to pass a law as pervasive as Knox-Keene and, in pre-empting the state's effort to do so, Congress infringed a power reserved to the states.

The argument has been made and met before. The Supreme Court stated in *Case v. Bowles,* 327 U.S. 92 (1946):

> "[T]he Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the national government' [footnote omitted].
>
> "Where, as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a State has a conflicting law which but for the congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that 'The Constitution and the Laws of the United States * * * make in Pursuance thereof * * * shall be the supreme Law of the Land * * * [footnote omitted]'." 327 U.S. at 102-103.

In *Oklahoma v. Atkinson Co.,* 313 U.S. 508 (1941), the Supreme Court also stated:

> "The Tenth Amendment does not deprive 'the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end' [citations omitted] Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state [footnote omitted]." 313 U.S. at 534.[10]

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10. It is true that the Tenth Amendment may operate to restrict Congressional power under the commerce clause when the subject of the regulation infringes the state's sovereignty. *National League of Cities v. Usery,* 426 U.S. 833 (1976). But that is not the case when, as here, the regulation deals with purely private activities of private employers. Thus, the arguments which petitioner based on *National League of Cities* are misplaced. (See Pet., pp. 15-21, *passim.*)

CONCLUSION

The petition should not be granted.

Respectfully submitted,

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